

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI  
EASTERN DIVISION

SHIRLEY PRITCHARD

PLAINTIFF

vs.

Civil Action No. 1:94cv87-D-O

HENKELS & McCOY, INC.

DEFENDANT

MEMORANDUM OPINION

Currently pending before this court in this matter is the motion of the defendant for an entry of summary judgment in its favor. Finding that there exist genuine issues of material fact only as to some of the plaintiff's claims, the motion will be granted in part and denied in part.

FACTUAL SUMMARY

There are many assertions and facts in contention in this case, and for the present purposes of the court it will be better at this portion of the court's opinion to briefly explain facts relevant to the nature of the case without much detail. When other contentions or facts become relevant to the court's analysis, they will be noted. From about April of 1992 until September of 1993, plaintiff Shirley Pritchard was employed in Starkville, Mississippi by the Deviney Company (Deviney). Ms. Pritchard contends that while employed there, she was subjected to sexual harassment by several supervisory employees of the company. The primary business of Deviney at the time was the construction of communication lines for South Central Bell. Deviney subsequently lost the South Central Bell contract, and therefore virtually abandoned the

Starkville operation. Defendant Henkels & McCoy, Inc. (Henkels) took over the South Central Bell contract and the Starkville operation as well. Pursuant to this takeover of the contract, many of the prior Deviney employees were hired by Henkels including the plaintiff<sup>1</sup>. Apparently, also among those hired were some of the employees whom the plaintiff claims sexually harassed her. Calvin Mills, who has never worked for Deviney, was employed by Henkels at the same office as Pritchard. The defendant states that Mills was Pritchard's immediate supervisor. The plaintiff denies this, but it appears that the plaintiff answered the phone for Mills and that Mills had the authority to fire the plaintiff.

The plaintiff states that she made various complaints to management concerning the actions of her fellow employees, both while working for Deviney and for Henkels. She eventually filed an EEOC charge against Deviney in December of 1993, and a state court action in the Oktibbeha County Circuit Court in January of 1994. The plaintiff states that these actions were widely discussed around the Henkels workplace. After the filing of her EEOC charges and state court lawsuit, the plaintiff also notes that the work

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<sup>1</sup> The parties do not dispute that the plaintiff was charged with various administrative duties within the company, including the collecting and preparation of billing to South Central Bell. However, the parties cannot agree as to the title of the plaintiff's job. The plaintiff asserts that she was the "office manager," while the defendant claims she was merely a "clerk." The court is of the opinion that the difference may only be semantical.

environment became "visibly different and harsher."

Regardless, both the plaintiff and the defendant agree that the quality of the plaintiff's work declined after Henkels took over the Starkville operation. The plaintiff explains that this decline is attributable to a lack of instruction on the part of Henkels and its supervisory staff. This decline led to errors in billing for which Pritchard was responsible.

Pritchard was fired by Calvin Mills on Monday, January 17, 1994. The firing of the plaintiff was a very hostile confrontation, and the parties hotly dispute the circumstances of this incident. The plaintiff filed this lawsuit<sup>2</sup>, and asserted the following claims against Henkels:

- 1) that her firing was in violation of Title VII of the Civil Rights Acts of 1964 and 1991 as a retaliatory firing in response to the filing of a claim with the EEOC;
- 2) that the defendant is liable to the plaintiff under the Mississippi "fighting words" statute for the actions of Calvin Mills during the firing incident;
- 3) that the defendant is liable to the plaintiff for a trespass committed by Calvin Mills during the firing incident; and
- 4) that the defendant was wrongfully terminated from her employment under Mississippi law.

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<sup>2</sup> Originally, this suit was filed against both Deviney and Henkels. The state court action against Deviney was dismissed so that the plaintiff could proceed against that party in federal court. Deviney and the plaintiff have since settled the claims against Deviney and that party has been dismissed from this action.

The defendant has now moved this court for the entry of a judgment as a matter of law in its favor.

#### SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. F.R.C.P. 56(c). The party seeking summary judgment carries the burden of demonstrating that there is an absence of evidence to support the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). After a proper motion for summary judgment is made, the non-movant must set forth specific facts showing that there is a genuine issue for trial. Hanks v. Transcontinental Gas Pipe Line Corp., 953 F.2d 996, 997 (5th Cir. 1992). If the non-movant sets forth specific facts in support of allegations essential to his claim, a genuine issue is presented. Celotex, 477 U.S. at 327, 106 S.Ct. at 2554. "Where the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986); Federal Sav. and Loan Ins. v. Krajl, 968 F.2d 500, 503 (5th Cir. 1992). The facts are reviewed drawing all reasonable inferences in favor of the non-

moving party. King v. Chide, 974 F.2d 653, 656 (5th Cir. 1992).

## DISCUSSION

### I. TITLE VII RETALIATION CLAIM

As a claim arising under Title VII, the plaintiff's claim of discrimination is subject to the McDonnell Douglas shifting burden of production. McDonnell Douglas Corp. v Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The plaintiff has the initial burden to establish his prima facie case. If the plaintiff does establish a prima facie case, "the employer must articulate some legitimate, nondiscriminatory reason for the termination." Flanagan v. Aaron E. Henry Community Health Serv. Ctr., 876 F.2d 1231, 1233-34 (5th Cir. 1989); Whiting v. Jackson State University, 616 F.2d 116, 121 (5th Cir. 1980). The employer need not prove the absence of a discriminatory motive, but must show that the discriminatory motive did not play a significant factor in the decision to discharge plaintiff. Whiting, 616 F.2d at 121. Once the employer articulates its nondiscriminatory motive, the burden is again on the plaintiff to prove that the articulated legitimate reason was a mere pretext for a discriminatory decision. Id. The burden of persuasion to establish the statutory violation ultimately rests with the plaintiff, "who must establish the statutory violation by a preponderance of the evidence." Id. Even if the plaintiff succeeds in revealing defendant's reasons for terminating him were false, he still bears the ultimate

responsibility of proving the real reason was "intentional discrimination." Saint Mary's Honor Center v. Hicks, --- U.S. ---, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993) ("It is not enough to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination.")

A. The Prima Facie case

In order to establish her prima facie case of retaliation under Title VII, the plaintiff must show:

- 1) that she engaged in activity protected by Title VII;
- 2) that an adverse employment action occurred; and
- 3) that there is a causal connection between the participation in the protected activity and the adverse employment decision.

Shirley v. Chrysler First, Inc., 970 F.2d 39, 42 (5th Cir. 1992).

There does not appear to be any dispute that the plaintiff has met the first two of the prima facie requirements. The plaintiff filed an EEOC claim against her employer charging sexual harassment, and thus engaged in activity protected under Title VII. Subsequent to this, she was terminated from her employment, albeit technically from a different employer. The existence of the remaining requirement required to establish her prima facie case - a causal connection - is a contended issue.

The plaintiff filed her EEOC complaint against Deviney on or about December 28, 1993. She was fired by Mills on January 17, 1994, less than three weeks later. This timing itself is inherently suspicious, and this alone is minimally sufficient for

the purposes of the motion at bar to establish her prima facie case as to a claim of reprisal discrimination. See, e.g., Shirley, 970 F.2d at 44; Wyatt v. City of Boston, 35 F.3d 13, 16 (1st Cir. 1994); Evans v. School Dist. of Kansas City, Mo., 861 F.Supp. 851, 858 (W.D. Mo. 1994). The plaintiff has met her burden in this regard.

Having determined that the plaintiff has met her burden under the present motion to establish her prima facie case as to her claim of reprisal discrimination, the court must apply the shifting burden of production and require the defendant to articulate a legitimate non-discriminatory reason for the action taken against the plaintiff.

B. Legitimate Non-discriminatory Reason for Discharge

The defendant offers unsatisfactory job performance as its legitimate non-discriminatory reason for discharging the plaintiff in this case. The plaintiff herself even admits that her work performance declined after being hired by Henkels, but attributes her deficiencies to lack of instruction and direction. In any event, the defendant has met its burden in this regard.

C. Pretext and Proof of Discrimination

Now that the defendant has presented its legitimate, non-discriminatory reason for discharge, the plaintiff must present evidence sufficient for a finder of fact to determine that the proffered reason is a mere pretext for discrimination.

As already discussed by the court, there is a close temporal proximity between the plaintiff's filing of EEOC charges against the defendant and her termination of employment. While sufficient to create a prima facie case, this fact alone is inadequate to provide proof of pretext. Armstrong v. City of Dallas, 997 F.2d 62, 67 (5th Cir. 1993). The plaintiff must provide more.

Before firing the plaintiff, Mills contacted two other Henkels supervisory employees, Ray Smith and David Floyd, concerning the termination of Pritchard. Ray Smith was a former Deviney employee against whom the plaintiff had claimed sexual harassment. The defendant states that Mills contacted the two simply to verify his authority to fire Pritchard, but the plaintiff contends that Smith and Mills were also good friends. The plaintiff asserts that Mills fired her for levying harassment claims against Smith because of this friendship. This alleged friendship adds to the circumstances surrounding this case, such as the close temporal proximity between the EEOC charge and the termination, from which a reasonable finder of fact could infer discrimination and base a finding of pretext.

The defendant asserts that Calvin Mills, the Henkels employee who fired the plaintiff, was completely unaware that the plaintiff had filed an EEOC claim against Deviney, or that she had filed a state court action. The plaintiff has admitted that she never told any manager or supervisor of Henkels that she had done such. If true, this would prevent the plaintiff from recovery, regardless of

a friendship between Mills and Smith. However, Pritchard also contends that her EEOC claim and corresponding lawsuit were common knowledge around the workplace. The parties dispute whether Mills had knowledge of the plaintiff's EEOC charges, and this dispute of a material issue of genuine fact precludes a grant of summary judgment based on this issue.

## II. THE "FIGHTING WORDS" STATUTE

The plaintiff asserts that when Calvin Mills fired her, he accused her of stealing a coat that had arrived for him in the mail. The plaintiff claims that she is entitled to recover for this accusation by Mills under the Mississippi "fighting words" statute. Miss. Code Ann. § 95-1-1 (1972). It is this court's opinion that the constitutional validity of this statute is tenuous at best. However, this court need not reach that aspect of this statute, in that the plaintiff has asserted this claim not against Mills himself but against his employer by virtue of *respondeat superior*. A corporate employer cannot be held liable under the "fighting words" statute for the words of its employee. Milner Hotels v. Dougherty, 15 So. 2d 358, 359 (Miss. 1943); Dixie Fire Insurance Co. v. Betty, 58 So. 705, 705 (Miss. 1912). Indeed, Chief Judge Senter has recently spoken for this court on the matter, reaching this same conclusion. Lawson v. Heidelberg Eastern, No. 1:93cv243-S-D (N.D. Miss. Jan. 10, 1995) (1995 WL 12587). There is no genuine issue of material fact as to this

claim of the plaintiff, and the defendant is entitled to a judgment as a matter of law on the matter.

### III. TRESPASS

The plaintiff has further claimed that Calvin Mills committed a trespass on her property during the firing incident. Pritchard asserts that Calvin Mills "rummaged" through her purse, ostensibly to obtain the tape recorder the plaintiff used to capture the exchange between the two concerning her termination. The plaintiff has not alleged that she was permanently dispossessed of her purse, or that her purse was sufficiently damaged in order to warrant an action for conversion. Under the facts presently given, this action is properly named one for trespass to chattels. The Mississippi Supreme Court has apparently not addressed this issue in detail, but has oft discussed the related tort action of conversion. See, e.g., Greenlee v. Mitchell, 607 So.2d 97, 111 (Miss. 1992); LaBarre v. Gold, 520 So.2d 1327, 1330 (Miss. 1987); Masonite Corp. v. Williams, 404 So.2d 565, 567 (Miss. 1981). "Trespass to chattels survives today . . . largely as a little brother of conversion." Prosser and Keeton on the Law of Torts, Ch.3 § 14, p.85 (5th Ed. 1984). There are, however, some important differences. See Trespass, 75 Am.Jur.2d §§ 16-24 (1994). This issue was not adequately addressed in the submissions of the parties, and the court cannot say that the defendant is entitled to a judgment as a matter of law on this issue.

#### IV. WRONGFUL TERMINATION

The final state law claim asserted by the plaintiff is one for wrongful discharge. The plaintiff and defendant agree that Pritchard was employed by Henkels as an employee-at-will. It is well established that under Mississippi law, an employee-at-will may be fired for any reason or no reason, but not for a legally impermissible reason. McArn v. Allied Bruce-Terminix Co., Inc., 626 So. 2d 603, 607 (Miss. 1993); Kelly v. Mississippi Valley Gas Co., 397 So. 2d 874, 874 (Miss. 1981). One such illegal reason is reporting illegal activity of the employer. McArn, 626 So. 2d at 607. It is this exception from the McArn decision that the plaintiff seeks to utilize in obtaining recovery against the defendant in this case.

The plaintiff states that pursuant to the direction of her superior, Wendy Padgett, she compiled records of personal telephone calls that Calvin Mills made from company phones. The plaintiff then forwarded these records to Padgett. The plaintiff asserts that Mills fired her because she was reporting these improper telephone calls to Mills, and that this termination is a proper basis for a state law claim of wrongful discharge under McArn.

This exception to the Mississippi employment-at-will doctrine is relatively recent, and the Mississippi Supreme Court has yet to further clarify the McArn decision. It is not the place of this court to create law for the state of Mississippi, but only to make

an educated guess as to how the Mississippi Supreme Court would resolve new problems. This court believes that it does not have before it sufficient information to make a proper determination. Once in possession of all the relevant facts, this court will be capable of a much clearer resolution of the plaintiff's claim in this regard. At this juncture, the court cannot say that the defendant is entitled to a judgment as a matter of law, and summary judgment on this issue will be denied.

#### CONCLUSION

The defendant is entitled to a judgment as a matter of law with regard to the plaintiff's claim under the Mississippi actionable words statute. As to the remaining claims, there are genuine issues of material fact which preclude the grant of summary judgment and the defendants are not entitled to a judgment as a matter of law. In any event, this court is of the opinion that the best course of action is to allow the remaining claims to proceed to trial. The United States Supreme Court has noted the flexibility of this court to do so. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) ("Neither do we suggest . . . that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.").

A separate order in accordance with this opinion shall issue this day.

THIS \_\_\_\_\_ day of January, 1995.

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United States District Judge

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HENKELS & McCOY, INC.

DEFENDANT

ORDER GRANTING IN PART AND DENYING IN PART  
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to a memorandum opinion issued this day, it is hereby  
ORDERED THAT:

1) the motion of the defendant for an entry of summary judgment as to the plaintiff is GRANTED as to the plaintiff's claim under Miss. Code Ann. § 95-1-1 (1972).

2) the motion of the defendant for an entry of summary judgment is DENIED as to the remaining claims of the plaintiff, in that this court is of the opinion that the best course would be to allow the plaintiff's claims to proceed to trial.

All memoranda, depositions, affidavits and other matters considered by the court in denying the defendant's motion for summary judgment are hereby incorporated and made a part of the record in this cause.

SO ORDERED, this the \_\_\_\_\_ day of January, 1995.

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United States District Judge